# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-262

THOMAS J. O'BRIEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On June 10, 1970, petitioner was charged in a four-count indictment with having attempted to evade payment of his income taxes for the calendar years 1964 through 1967 by filing false and fraudulent income tax returns, in violation of 26 U.S.C. 7201. Prior to trial, the district court, relying on *United States* v. *Leahey*, 434 F. 2d 7 (C.A. 1), granted petitioner's motion to suppress certain evidence in the

possession of the government (Pet. App. 24).[1] The government then moved for leave to dismiss the indictment pursuant to Rule 48(a), Fed. R. Crim. P., stating that since the bulk of the evidence had been suppressed there was no reasonable likelihood that the case could be successfully presented and therefore that further prosecution would not be in the interests of justice (Pet. App. 24-25).[2] Leave to dismiss was granted by the court (Pet. App. 25).

Three months later, petitioner was charged in a four-count indictment with making false and fraudulent statements under oath in his tax returns for the calendar years 1964 through 1967, in violation of 26 U.S.C. 7206(1).[3] Petitioner waived a jury trial and "assented" to a finding of guilty, reserving the right

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[1] In *Leahey* the court held that where a special agent failed, in an interview with a taxpayer under investigation for tax fraud, to give *Miranda*-type warnings as required by announced Internal Revenue Service procedures, evidence obtained in the course of the interview was inadmissible. Petitioner had not been given such warnings upon being contacted by a special agent, and the evidence obtained from him by the special agent was suppressed.

[2] Rule 48(a), Fed. R. Crim. P., provides:

> The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

[3] This indictment was based on evidence obtained by a revenue agent before the special agent's entry into the case. Apparently this evidence had not been made available to the United States Attorney or presented to the grand jury in connection with the first indictment.

to appeal on the issue whether dismissal of the first indictment barred prosecution on the second on grounds of double jeopardy, estoppel or due process (Pet. App. 25). Petitioner was sentenced to concurrent terms of three months' imprisonment on each count and fined a total of $8,000 ($2,000 on each count). The court of appeals affirmed (Pet. App. 24-26).

2. Petitioner contends (Pet. 6-22) that dismissal of the first indictment barred prosecution on the second indictment and that the decision below conflicts with decisions of this Court and of other courts of appeals. However, this case presents no conflict with other decisions, was correctly decided below, and warrants no further review.

Petitioner primarily relies (Pet. 6-19) on the doctrines of *res judicata* and collateral estoppel.[4] Neither doctrine supports his position, however. It is well settled that, unless the district court expressly indicates otherwise, dismissal of an indictment under Rule 48(a) does not constitute *res judicata* as to any substantive issue and does not bar a future prosecution for the same offense. *United States* v. *Chase*, 372 F. 2d 453, 463-464 (C.A. 4), certiorari denied, 387 U.S. 907 and, *sub nom. Parrish* v. *United States*,

[4] Petitioner apparently has abandoned his claim, advanced in the court of appeals (Pet. 5), that prosecution on the second indictment was barred by the Double Jeopardy Clause of the Fifth Amendment. The court below correctly held that where, as here, dismissal is not expressly with prejudice and occurs prior to impaneling the jury, jeopardy does not attach. See *Downum* v. *United States*, 372 U.S. 734.

387 U.S. 913; *Spriggs* v. *United States*, 225 F. 2d 865 (C.A. 9), certiorari denied, 350 U.S. 954; *Dortch* v. *United States*, 203 F. 2d 709, 710 (C.A. 6), certiorari denied, 346 U.S. 814. See also *Mann* v. *United States*, 304 F. 2d 394, 398, n. 12 (C.A.D.C.), certiorari denied, 371 U.S. 896. See generally A.L.I. *Restatement of the Law, Judgments* § 53 (1942). Here, of course, the second indictment was returned under a different statute and was not for the same offense. Nor is the doctrine of collateral estoppel, which applies only to relitigation of issues already determined by a valid, final judgment, of any assistance to petitioner here. See *Ashe* v. *Swenson*, 397 U.S. 436, 443. See generally A.L.I. *Restatement of the Law, Judgments* § 68 (1942). In granting leave to dismiss, the district court did not determine any factual or legal issues pertaining to petitioner's culpability. None of the decisions cited by petitioner is contrary to these settled principles, and they were correctly applied in the decision below.

Petitioner also argues (Pet. 17, 19-22) that the government was estopped from prosecuting on the second indictment by the representation made in seeking leave to dismiss the first indictment. That representation, which was made in good faith, was not a guarantee; it did not imply or suggest that petitioner would not subsequently be indicted and prosecuted for a related offense. Although petitioner apparently argues that the prosecutor's statement was equivalent to a promise of transactional immunity, it was in fact simply a candid acknowledgment that further prosecu-

tion on that indictment at the time would be pointless. In no sense did that statement preclude the government from continuing to investigate petitioner's criminal liability and charging him with provable offenses.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

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